

SERVICE DATE - LATE RELEASE JULY 26, 2002

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. 42069

DUKE ENERGY CORPORATION

v.

NORFOLK SOUTHERN RAILWAY COMPANY

STB Docket No. 42070

DUKE ENERGY CORPORATION

v.

CSX TRANSPORTATION, INC.

MOTIONS TO COMPEL DISCOVERY

Decided: July 26, 2002

On March 4, 2002, defendants Norfolk Southern Railway Company (NS) and CSX Transportation, Inc. (CSXT) filed separate motions to compel answers to interrogatories and production of documents in the above-entitled proceedings.¹ Defendants also seek extension of the discovery period and the procedural schedules in each of these cases. Duke Energy Corporation (Duke Energy), the complainant in these proceedings, filed replies to the motions to compel on March 15, 2002.² The motions to compel will for the most part be denied, although Duke Energy will be directed to supply the information it has agreed to furnish.

¹ These proceedings are not consolidated. A single decision is being issued for administrative convenience.

² With the concurrence of Duke Energy, defendants filed their motions to compel with respect to their first set of discovery requests 1 business day beyond the 10-day period for motions to compel specified in 49 CFR 1114.31(a). The reason for the delay, according to defendants, was to permit the parties to complete their discussions over possible resolution of their dispute. Defendants submit that the delay also allowed them to include in their motions to compel certain disputes arising out of Duke Energy's responses to defendants' second set of discovery requests. Defendants' explanation is reasonable and the delay did not prejudice any party. Accordingly, the motions to compel will be considered.

BACKGROUND

By separate complaints filed and served on NS and CSXT on December 19, 2001, in STB Docket Nos. 42069 and 42070, respectively, Duke Energy challenges the reasonableness of rates for movements of coal: (1) by NS from origins in Virginia, West Virginia, and Kentucky to Duke Energy's Allen, Belews Creek, Buck, and Dan River electricity generating facilities, located at Belmont, Walnut Cove, Spencer, and Eden, NC, respectively; and (2) by CSXT from origins in Virginia, West Virginia, and Kentucky to Duke Energy's Cliffside, Riverbend, and Lee electricity generating facilities, located at Brice and Riverbend, NC, and Pelzer, SC, respectively. Duke Energy alleges that defendants possess market dominance over the traffic and requests that maximum reasonable rates be prescribed along with other relief. Duke Energy also requests an award of reparations. Decisions that included both a protective order and a procedural schedule were served in these proceedings on February 5, 2002.³

STB Docket No. 42069. NS's service was formerly provided under a rail transportation contract that terminated on December 31, 2001. In response to Duke Energy's request for common carrier rates, NS established common carriage rates and service terms covering the movements formerly under contract, effective January 1, 2002. These rates and service terms were subsequently amended by NS in a new schedule denominated Norfolk Southern Price Authority NSRQ 61880 Section 1A00, effective January 30, 2002.⁴ On April 5, 2002, Duke Energy filed a request to amend and supplement its complaint to include the new schedule on the grounds that the rates, charges, and service terms set forth therein are unlawful and unreasonable and/or reflect unreasonable practices.

In separate pleadings filed on April 18, 2002, NS filed an answer to the amended complaint and a motion to strike or, in the alternative, to make more definite Duke Energy's unreasonable practices claim. In a subsequent reply filed on April 24, 2002, Duke Energy withdrew its unreasonable practices claim. Under the circumstances, the motion to strike is moot, and the April 5 amended complaint, as modified on April 24, 2002, will be accepted.

STB Docket No. 42070. CSXT's service was formerly provided under a rail transportation contract that terminated on December 31, 2001. In response to Duke Energy's request for common carrier rates, CSXT established a series of interim common carriage rates and service terms covering the movements formerly under contract, effective January 1, 2002, to

³ The procedural schedules in these cases were subsequently extended by joint requests of the parties, in decisions served on April 5, 2002.

⁴ The amended schedule incorporated the identical rate levels and service terms but added a new provision establishing a methodology for quarterly adjustments of the rate levels beginning April 1, 2002.

terminate February 28, 2002.⁵ Duke Energy's original complaint addressed only one of the schedules, CSXT-CORE-105. CSXT established non-interim, long-term volume coal rates in CSXT-CORE-120, effective March 1, 2002,⁶ and new rates to cover shipments of synthetic fuel derived from coal in CSXT-CORE-128, effective March 12, 2002. On April 5, 2002, Duke Energy filed a request to amend and supplement its complaint to include the remaining interim rates not addressed in its complaint and the subsequently filed non-interim rates, and to add a count that the rates, charges, and service terms set forth in those rates and in CSXT-CORE-105 reflect unreasonable practices.

In separate pleadings filed on April 17, 2002, CSXT filed an answer to the amended complaint; a motion to strike or, in the alternative, to make more definite Duke Energy's unreasonable practices claim; and a motion either to sever that portion of the amended complaint involving the CSXT-CORE-128 synthetic fuel rate as a separate proceeding or to reopen discovery and suspend the existing evidentiary schedule in this proceeding to permit CSXT to complete additional necessary discovery regarding the synthetic fuel rate issues. In a subsequent reply filed on April 24, 2002, Duke Energy withdrew both its unreasonable practices claim and its challenge to the synthetic fuel rates contained in CSXT-CORE-128. Under the circumstances, the motions to strike and/or sever are moot and the April 5 amended complaint, as modified on April 24, 2002, will be accepted.

DISCUSSION AND CONCLUSIONS

The issues to which the motions to compel are directed are the estimation of future traffic volumes and revenues of the stand-alone railroads (SARRs) proposed by Duke Energy in its stand-alone cost (SAC) presentations in these cases. Defendants note that, in recent cases, issues of future traffic volumes and revenues have assumed increasing importance in SAC calculations under the (typically 20-year) discounted cash flow model that is used to simulate how a SARR would likely recover its capital investments. To probe these issues, defendants seek to obtain from Duke Energy forecasts and projections of demand for electric power, electricity generation, coal and other fuel consumption, rail rate levels, inflation factors, and the costs and availability of alternative sources of electricity, including purchased power. Defendants assert that this information would have a bearing on the future level of electricity generation, and, therefore, on coal consumption and coal transportation volumes at the Duke Energy plants at issue in these proceedings and at any other generating facilities included in the traffic group of the SARRs. Defendants argue that they are entitled to review the requested documents and information for

⁵ The specific schedules are: CSXT-CORE-105, CSXT-CORE-109, CSXT-CORE-115, and CSXT-CORE-117.

⁶ CSXT-CORE-120 was subsequently amended, with certain provisions having an effective date of March 14, 2002.

purposes of assessing the claimed future traffic volumes and revenues of the SARRs and to make sure that the claims Duke Energy presents in its SAC evidence are not inconsistent with the facts and positions reflected in Duke Energy's own internal business records.

Duke Energy responds that it has already produced documents bearing directly on the future coal traffic moving to its plants; that producing the additional materials sought here would be burdensome; and that the materials sought relate to what it describes as indirect factors, such as possible future legislative or regulatory actions by other bodies that could affect future coal consumption.⁷

The Board's rules generally provide for liberal discovery of non-privileged matter that is reasonably calculated to lead to discovery of admissible evidence. 49 CFR 1114.21(a). However, discovery requests must be narrowly drawn, directed toward a relevant issue, and not used for a general fishing expedition.⁸ Moreover, it is unduly burdensome to require a party to produce information that is available from public records or through less intrusive means.

To make a SAC presentation, a shipper designs a SARR that is specifically tailored to serve an identified traffic group. Because a SAC analysis covers an extended (usually 20-year) period, it entails projections of future traffic and revenues, and these projections are inherently uncertain. The Board recognizes this fact, and therefore holds open the possibility of modifying its analyses based on future developments when they occur. Thus, parties are protected from the consequences of projections that do not materialize. See Wisconsin Power at 33. Nevertheless, the potential traffic draw and attendant costs of the SARR are open to scrutiny, and the shipper must be prepared to defend the assumptions underlying its design and cost estimates.⁹ Thus, the credibility of projections and forecasts made by the complaining shipper in its SAC presentations is a potentially significant issue in a SAC case.

⁷ See Duke Energy Reply to NS motion, at 9-10. Duke Energy relies on Wisconsin Power and Light v. Union Pacific Railroad Company, STB Docket No. 42051 (STB served Sept. 13, 2001) (Wisconsin Power), for the proposition that such factors are not considered.

⁸ See, e.g., FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Docket No. 42022, et al., slip op. at 6-7 (STB served Aug. 31, 1998); Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104, slip op. at 6 (STB served Oct. 27, 2000).

⁹ See Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520, 544 (1985) (Coal Rate Guidelines), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

It follows that a defendant railroad is entitled to challenge the assumptions made by the shipper in its SAC presentation.¹⁰ But while a railroad is not prohibited from attacking the traffic forecasts and projections using other evidence or assessments of what Duke Energy describes as indirect factors,¹¹ it does not necessarily follow that the railroad must depend upon burdensome discovery to do so. Indeed, given the business interests of both railroads and shippers in much of the information involved here, the railroads should have just as much incentive as the shippers on whose traffic they depend to independently develop their own assessments as to these matters. Moreover, given the burdens associated with producing this type of information through discovery, it appears that in most cases, granting overly broad discovery requests of this type would unnecessarily disrupt the efficient processing of these cases.

Here, the defendants seek an order compelling Duke Energy to respond fully to various discovery requests which can be grouped and categorized as follows: (1) projections and forecasts of electricity demand and generation, coal consumption, and rail rates; (2) analyses of costs and effects of compliance with applicable environmental laws, regulations, and requirements; (3) economic dispatch policies and practices; (4) studies or analyses of the impact of possible use of alternative fuels or changes in technology on Duke Energy's electricity generation; (5) the impact of changes in rail rates for coal transportation on electricity generation and coal consumption; and (6) the impact of challenged rates on Duke Energy.¹² An analysis of these requests follows.

1. Projections and forecasts of electricity demand and generation, coal consumption, and rail rates. Defendants seek forecasts-and-projections information relating to a variety of factors that they argue could materially affect the amount of coal traffic and revenues potentially available to the SARR in future years.¹³ Duke Energy has objected to providing full responses

¹⁰ See Wisconsin Power and Light Company v. Union Pacific Railroad Company, STB Docket No. 42051, slip op. at 4 (STB served June 21, 2000).

¹¹ The September 13, 2001 decision in Wisconsin Power analyzed such factors and dismissed them as uncertain. It reflects the Board's analytical process for determining the present or future traffic levels of a SARR, which is to base Board decisions on the best evidence on the record. Wisconsin Power at 14-28. See also FMC Wyoming Corporation and FMC Corporation v. Union Pacific Railroad Company, STB Docket No. 42022, et al., slip op. at 26-36 (STB served May 12, 2000).

¹² Only NS seeks discovery as to the sixth category.

¹³ Specifically, NS Interrogatory Nos. 24 and 25, NS Document Production Request No. 28, CSXT Interrogatory Nos. 25 and 26, and CSXT Document Production Request No. 29
(continued...)

based on relevance and burden. Instead, according to defendants, Duke Energy produced only limited forecast information consisting of generalized reports filed with state regulatory agencies containing highly aggregated estimates of future electricity generation and fuel consumption by fuel type,¹⁴ one coal consumption forecast prepared by a commercial outside vendor, and a one-page list containing unspecified estimates of future rail rates for certain plants. Although Duke Energy had also objected to producing any information relative to non-issue plants, on March 4, 2002, it produced short-term forecasts (extending to the year 2003) of coal consumption for all of its coal-fired generating plants, and advised defendants that it will produce, if available, inflation and rail cost forecasts.

Defendants argue that forecast information concerning the relative availability and operating costs of all of Duke Energy's generating facilities (and not just the ones covered by the complaints)¹⁵ is directly relevant in estimating future traffic volumes and revenues of the SARR. If, however, Duke Energy's computer forecasting model is governed by third-party licensing restrictions or for some reason is otherwise burdensome to produce, defendants state that they would accept a print-out or listing of the material data inputs and assumptions that produce the forecast results, as well as copies of data output from the model.

Following the filing of the motions to compel, Duke Energy identified the types of data inputs used by its computerized forecasting model and produced detailed 1999, 2000, and 2001 unit-specific, 15-year forecasts regarding its anticipated coal burn. Duke Energy also agreed to

¹³(...continued)

seek: (1) information concerning Duke Energy's forecasts of various relevant factors and indicators, including generating capacity, demand for power, transmission constraints, coal burn and other fuel burn, coal availability and costs, rail transportation rates, and projected rates of inflation; (2) the assumptions and data used to prepare those forecasts; (3) and the related documents. NS Document Production Request Nos. 30 and 31, and CSXT Document Production Request Nos. 31 and 32 seek the computer models that Duke Energy uses or could use to develop forecasts or estimates of the various economic measures bearing on future SARR traffic volumes and revenues, including input data and assumptions and previous output from such models.

¹⁴ Although the publicly filed reports summarize the results of Duke Energy's forecasting model in estimating future electricity demand and fuel consumption for its system as a whole and for different fuel types, defendants argue that they do not contain plant-specific fuel consumption or electricity generation forecasts and do not detail the assumptions and data inputs underlying the projections.

¹⁵ In addition to the seven Duke Energy plants that are the subject of these complaints, both defendants provide single-line service to Duke Energy's Marshall facility located at Terrell, NC.

produce any forecasts in its possession regarding changes in the Rail Cost Adjustment Factor and regarding measures of inflation. Thus, along with the shorter-term forecasts of coal consumption previously provided, Duke Energy submits that it has provided all of the information that defendants need regarding forecasts of coal tonnage volumes, coal prices, and rail rates for the SARR.

Given the discussion above, these interrogatories and document production requests are overly broad and burdensome in the range of information and documents sought and to the extent that they involve plants that are not included in the respective SARRs. Moreover, given that Duke Energy has already produced information related to its computer forecast model, as well as other forecast information involving coal tonnage volumes, coal prices, and rail rates for coal shipments pertaining to the specific Duke Energy plants involved in the respective SARRs,¹⁶ the defendants should have the necessary forecast and projection information to be able to advance their position. Accordingly, the motions to compel will be denied.

2. Analyses of costs and effects of compliance with applicable environmental laws, regulations, and requirements. Defendants seek discovery related to the potential effects of environmental laws, regulations, and enforcement litigation on the future volume of coal consumed by the coal plants that they individually serve and that would potentially be included in the SARRs.¹⁷ Duke Energy has responded by referring to publicly filed reports and has declined to produce any documents and information responsive to these requests, based on relevance and burden.

¹⁶ According to Duke Energy's opening statement, each SARR would provide service to the Duke Energy plants at issue in its respective complaint, to the Marshall plant, to other electrical power plants not owned by Duke Energy, and to river and ocean transfer points and interchanges with the respective residual incumbent carrier.

¹⁷ Specifically, NS Interrogatory No. 27; NS Document Production Request Nos. 33, 38(b), 65, 66, 70, and 76(d); CSXT Interrogatory No. 28; and CSXT Document Production Request Nos. 34, 39(b), 67, 68, 72 and 78(d) ask Duke Energy to identify State or Federal regulatory proceedings to which it has been a party and in which its compliance with the amended Clean Air Act or other environmental regulations was at issue, and request copies of: (1) studies or analyses concerning the impact or potential impact of Duke Energy's compliance with the amended Clean Air Act, or other existing or proposed law or regulation restricting emissions from electric generating facilities; (2) any additional studies or analyses relating to the Federal government's Clean Air Act enforcement action, the proposed North Carolina emissions legislation, and other actual or proposed emissions regulations; and (3) studies or analyses of effects of environmental, mining, and trucking restrictions on coal availability and reserves in the Central Appalachian mine region.

Defendants argue that Duke Energy's coal-fired electric generating plants are subject to significant and extensive environmental laws and regulations, by both Federal and State governments, that may affect Duke Energy's decisions concerning: (1) the amount of electric power it produces at its coal-fired plants; (2) whether to convert these plants to alternative fuels; (3) the use of different types of coal from different sources; (4) a shift in power production to generating facilities that use other fuels or other means of generation; or (5) the possible closure of some plants. In addition, defendants assert that Duke Energy's coal-fired power plants are the subject of a large pending enforcement suit brought by the United States and others seeking to impose restrictions on those plants, as well as to assess fines and penalties for alleged violations of the Clean Air Act. Defendants submit that it is inconceivable that Duke Energy has not studied these issues and assessed their potential impact, and, indeed, Duke Energy has not denied that such responsive documents exist. Moreover, defendants argue that the request is not burdensome.

As drawn, these interrogatories and document production requests are overbroad and burdensome and, accordingly, the motions to compel as to these items will be denied. To the extent defendants seek information about regulatory proceedings involving Duke Energy, that information is publicly available and the motions to compel and other pleadings filed by defendants confirm that they are actively monitoring those proceedings. Thus, it is unnecessary to require Duke Energy to provide information that the defendants already possess or have ready access to.

3. Economic dispatch policies and practices. Defendants argue that information about how Duke Energy applies economic dispatch practices and calculates the relative dispatch order and position of its coal-fired plants is of considerable relevance to the likely future dispatch order and, as a result, to the likely future level of electricity generation and coal consumption at the coal plants likely to be served by the proposed SARR. Accordingly, defendants seek documents and information relating to Duke Energy's economic dispatch practices.¹⁸

¹⁸ The specific requests are: (1) NS Interrogatory Nos. 19 and 20; NS Document Production Request Nos. 17, 20, and 22; CSXT Interrogatory Nos. 20 and 21; and CSXT Document Production Request Nos. 18, 21 and 23 seeking information regarding policies, procedures, and documents regarding Duke Energy's dispatch priorities and the selection of internal power generation as opposed to off-system power purchases; (2) NS Interrogatory Nos. 11(o) and (p), NS Document Production Request Nos. 18 and 21, CSXT Interrogatory Nos. 12 (o) and (p), and CSXT Document Production Requests Nos. 19 and 22 seeking information and documents concerning the historical dispatch order and price of Duke Energy's existing generating facilities; and (3) NS Document Production Request No. 23, and CSXT Document Production Request No. 24 seeking studies or analyses, including workpapers and supporting documents, relative to Duke Energy's decision whether to generate or purchase electric power to
(continued...)

According to defendants, Duke Energy objected on various general grounds, including relevance and burden, to these discovery requests notwithstanding its acknowledgment (in response to NS Interrogatory No. 19 and CSXT Interrogatory No. 20) that it does follow an economic dispatch policy in which generating resources are ranked in terms of operating costs. Evidently, Duke Energy has agreed to produce monthly dispatch “snapshots” for the period since January 1, 1999. NS states that, to narrow the dispute and reduce any burden to Duke Energy, it now asks only that Duke Energy produce its dispatch computer model or, at a minimum, an identification of the data inputs and assumptions used in the model. Although CSXT is also willing to amend the scope of its requests, it seeks written policy statements, directives, or guidelines addressing Duke Energy’s dispatch practices, in addition to the utility company’s dispatch computer model or data inputs and assumptions used in that model.

The requested motions to compel will be denied. As Duke Energy notes, its dispatch computer model is a commercially licensed program that is subject to licensing restrictions. Duke Energy also advises that its dispatchers are held accountable to the principles and standards of the North American Electric Reliability Council (NERC), contained in NERC’s Operating Manual, which is available to defendants. With the operating manual and the monthly dispatch “snapshots” that Duke Energy has agreed to produce, defendants should have sufficient dispatch information that they need from Duke Energy.

4. Studies or analyses of the impact of possible use of alternative fuels or changes in technology on Duke Energy’s electricity generation. Defendants seek studies and analyses assessing the possible use of alternative fuels and the impact of changes in electric generating technology on future generating output and fuel consumption at its generating plants.¹⁹ Duke Energy has declined to produce such materials on the grounds of relevance and burden.

¹⁸(...continued)

meet its native or jurisdictional load requirements; NS Document Production Request Nos. 30 and 31, and CSXT Document Production Request Nos. 31 and 32 seeking computer models or software used by Duke Energy to determine dispatch order, could also be viewed as coming within the category, but have been addressed above, in category 1. See supra note 13.

¹⁹ Specifically, NS Document Production Request No. 24 and CSXT Document Request No. 25 seek each study or analysis, and all workpapers and other supporting documents and data prepared by Duke Energy (or by any person retained or employed by Duke Energy) between January 1, 1999, and the present, referring to: (1) the future use of alternative fuels at any of Duke Energy’s existing plants or at any plant it plans to construct or operate in the future; (2) the impact of potential advances in technology on the future volume or amount of coal or alternative fuels used at any existing Duke Energy plant or at any plant it plans to construct or operate in the future; and (3) the feasibility, costs, and benefits of converting any Duke Energy coal-fired plant to allow it to use alternative fuels to generate electricity.

Defendants submit that, if Duke Energy has conducted studies or analyses regarding the feasibility of converting the issue plants to the use of alternative fuels, or has studied the potential effects that technological changes or facilities modifications would have on the level of electricity generation and coal consumption at these plants, such information would be directly relevant to, and highly probative of, the issue of the future coal traffic volumes and revenues of the SARR. Duke Energy points out that the requests are not confined to Duke Energy's coal-fired plants, but are drawn so broadly as to seek information regarding the impact of all technological improvements at its plants, as well as information regarding advances in the manner in which coal is mined or transported by railroads. Defendants express a willingness to narrow the request.

In response to the discovery request, in letters to defendants dated March 1, 2002, Duke Energy confirmed that it does not plan to convert any of its coal-fired plants to permit the use of alternative fuels. Duke Energy asserts that this confirmation coupled with the detailed coal burn projections that it already has produced in this case, give defendants all of the information to which they are entitled.

The motions to compel will be denied. As Duke Energy argues, the document production requests are overly broad, and, to the extent they relate to "technology advances," lack specificity. Moreover, Duke Energy's admission that it does not plan to convert any of its coal-fired plants to permit the use of alternative fuels should end this inquiry.

5. Impact of changes in rail rates for coal transportation on electricity generation and coal consumption. Defendants seek all documents that refer to the potential impact that changes in the level of the rail rates for transportation of coal to the issue plants and the Marshall facility could have on the volume of coal consumed and the level of electric power produced at those plants.²⁰ Defendants argue that such information could have direct relevance to the traffic and revenues available to the SARR. To limit the burden on Duke Energy, defendants have narrowed the requests to studies and analyses, as opposed to routine e-mails or other internal communications of an informal nature.

In reply, Duke Energy states that it does not prepare sensitivity analyses regarding changes in rail rates and therefore has no documents to produce in response to the amended scope of these requests. Accordingly, a motion to compel would be pointless and the request will be denied.

²⁰ The specific document production requests are: NS Document Production Request Nos. 29(b) and 29(c), and CSXT Document Production Request Nos. 30(b) and 30(c).

6. Impact of the challenged rates on Duke Energy. NS seeks information and documents concerning the impact of the challenged rates on Duke Energy.²¹ NS argues that Duke Energy's ability (or inability) to recover the costs of rail transportation would be relevant to rebut any claim Duke Energy might make that the challenged rates should be regulated under the phasing constraint of the Coal Rate Guidelines, which allows, upon a specific demonstration of need, an otherwise justified rate increase to be imposed in stages to prevent "significant economic dislocations." 1 I.C.C.2d at 546-47.

Duke Energy argues that such dislocations are in no way mitigated by the passing-through of coal transportation costs by utilities to their customers via fuel surcharge adjustments, and that the phasing constraint is an appropriate means of ensuring the "public need for smooth, orderly economic transitions."²² Thus, Duke Energy submits that the application of the phasing constraint would not be undermined by the presence of pass-through arrangements.

It should be noted that neither Duke Energy's complaint, as amended, nor its opening evidence and argument addresses the phasing constraint issue. Accordingly, there is no need for discovery on this issue.

One final matter must be addressed. Defendants seek an order compelling Duke Energy to provide its current long-term coal supply contracts, as well as documents reflecting negotiations between Duke Energy and its contract coal suppliers over possible amendment or termination of existing contracts, documents assessing potential future sources of coal supply, and information about coal prices;²³ and other specified materials governed by third-party

²¹ The specific requests are: (1) NS Interrogatory No. 36, which asks Duke Energy to identify any constraints (legal or otherwise) that prevent it from recovering from its electricity ratepayers (wholesale or retail) any portion of the costs of transporting coal by rail to any coal-fired Duke Energy plant, including increases in such costs of transportation; (2) NS Interrogatory No. 37, which asks Duke Energy to identify, for each calendar year from January 1, 1999, to the present, the amount of any coal transportation costs that it did not recover from those ratepayers, the reasons for such failure to recover such costs, and the circumstance for such failure; and (3) NS Document Production Request No. 59, which seeks all documents referring to Duke Energy's ability or right to recover from its electricity ratepayers (wholesale or retail) any portion of the costs of transporting coal by rail to any coal-fired Duke Energy plant, including increases in such costs of transportation.

²² Coal Rate Guidelines, 1 I.C.C.2d at 546.

²³ NS Interrogatory Nos. 12(d) and 22; NS Document Production Request Nos. 10, 11, and 12; CSXT Interrogatory Nos. 13(d) and 23; and CSXT Document Production Request (continued...)

confidentiality restrictions.²⁴ While not contesting this discovery, Duke Energy notes that a Board order is necessary to satisfy third-party confidentiality requirements contained in these documents. Accordingly, an order compelling Duke Energy to produce its coal supply contracts, related documents, and the other third-party confidential materials responsive to the specific discovery requests identified by defendants will be issued, subject to the protective orders served in these proceedings on February 5, 2002.

Procedural Schedule. Defendants request that the Board extend the discovery period, which was scheduled to close on March 4, 2002, until all discovery disputes have been resolved and all outstanding discovery has been completed. They submit that, in addition to the issues raised in their motions to compel, numerous other discovery activities remain incomplete. In decisions served on April 5, 2002, the due dates for filing opening statements were extended to May 24, 2002, reply statements were extended to August 15, 2002, and rebuttal statements were extended to September 23, 2002. The parties filed their opening statements on May 24, 2002. By petition filed on July 9, 2002, defendants again seek modification of the procedural schedule to extend the August 15, 2002 due date for filing replies for a period of at least 30 days beyond completion of all pending discovery matters involved in these motions to compel. They also ask that the due date for filing rebuttal evidence be correspondingly extended.

These cases should be moved forward expeditiously, and this order will hopefully facilitate that process. But a short extension of the procedural schedule appears necessary to allow sufficient time for defendants to receive and review documents covered by this decision and prepare their reply statements, particularly given the sudden death, on July 23, 2002, of one of the lead counsel in the proceeding. Accordingly, the parties should expeditiously complete discovery, and then attempt to agree upon a procedural schedule to submit to the Board.²⁵

²³(...continued)

Nos. 11, 12, and 13.

²⁴ NS Interrogatory Nos. 12(d), 12(g), 24(l), and 24(m); NS Document Production Request Nos. 12, 43, 61, 62, 67, 71, and 75; CSXT Interrogatory Nos. 13(d), 13(g), 25(l), and 25(m); and CSXT Document Production Request Nos. 13, 44, 61, 62, 69, 73, 75, and 77.

²⁵ Given the size of the rate increases at issue, Duke Energy has suggested that the Board should condition any extension of the evidentiary schedule on an interim “rollback” of the challenged rates, subject to an arrangement in which Duke Energy would agree to pay the difference (plus interest) between the “interim” rates and any higher rate levels found reasonable in the final decision on the merits. Duke Energy’s concerns about these rate increases will be addressed fully when the Board considers the merits of these cases. But given the availability of reparations, a rate rollback is not warranted.

It is ordered:

1. Duke Energy's amended complaints filed April 5, 2002, as modified April 24, 2002, are accepted.
2. The motions to compel production of Duke Energy's coal supply contracts, related documents, and the other third-party confidential materials discussed above are granted, subject to the protective orders served in these proceedings on February 5, 2002.
3. Duke Energy is directed to supply the information it has agreed to furnish.
4. In all other respects, the motions to compel are denied.
5. The parties shall meet and submit revised procedural schedules for these proceedings as soon as possible.
6. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary